SUPREME COURT, U.S.

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No. 71-681

In the Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS LEONARD O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of refusing to submit to induction into the Armed Forces of the United States in violation of 50 U.S.C. App. 462. He was sentenced to a term of imprisonment of three years and six months. The Ninth Circuit Court of Appeals affirmed the conviction; and a petition for rehearing with a suggestion for a rehearing *en banc* was denied on October 21, 1971.

After registering in 1962, petitioner received a series of student deferments. On March 9, 1967, upon completion of his studies, he was classified 1-A. On June 12, 1967, an order to report for induction was

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mailed to him; however, induction was postponed pending a decision on his application for entrance into the Naval Officers Candidate School, which was successful, but petitioner declined the appointment. On October 19, 1967, petitioner was given a teaching deferment.

On February 15, 1968, petitioner was reclassified 1-A. On March 19, 1968, he was mailed an order to report for induction on April 2, 1968 (SSF 10, 125), which was again deferred at petitioner's request.

On April 4, 1968, the board notified petitioner that his request to report for induction on April 2, 1968, was still in effect, and advised him to go at once to the local board nearest the where he was living and request a transfer (SSF 131). On April 15, 1968, the local board in Nevada, where he was living, ordered petitioner to report on April 29, 1968, for induction (SSF 134). On that date, the local board in Iowa received from petitioner a completed Form 150, a form for conscientious objectors (SSF 10, 135-165). On April 30, 1968, petitioner refused to submit to induction.

On May 2, 1968, the local board informed petitioner that the board had determined not to reopen his classification and had refused a right of appeal because of the untimely filing of the information. It told petitioner of his continuing obligation to report as ordered for induction by the local board of transfer. (SSF 167, 214).

On May 14, 1968, the board declared petitioner a delinquent because of his refusing induction on April 30, 1968 (SSF 168). The Legal Advisor for the State Director reviewed the file and on June 7, 1968,

wrote to petitioner stating: "This letter is to inform you that you will report for induction as ordered without further delay" (SSF 203). Petitioner's attorney contacted the local board concerning the refusal of the board to reopen petitioner's classification and requested that petitioner be given a personal hearing accompanied by the attorney. The board replied on August 1, 1968, denying the request as untimely (SSF 218).

Petitioner's Selective Service File was forwarded to Iowa State headquarters for review, after which it was sent to the United States Attorney for consideration of prosecution. On February 27, 1969, the United States Attorney at Los Angeles wrote to the United States Attorney at Sioux City, Iowa, declining prosecution for failure to report on April 30, 1968, because the file showed that petitioner had filed an SSS Form 150, "conscientious objector claim" prior to being ordered for induction, and requested a postponement which was not granted, and because the file failed to reflect that a vote was taken by the members of the board. The United States Attorney noted that the petitioner was then living in Iowa and the board there should send him a "continuing duty order" (SSF 221). The United States Attorney also suggested that the board might wish to consider his Form 150 and record the vote in the minutes of action. Following receipt of this letter, the representative for the State Director, on

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This seems to be at odds with the record, which shows that on April 15, 1968, petitioner was sent an Order for Transferred Man to Report for Induction on April 29, 1968 (SSF 224), and petitioner's letter claiming conscientious objector status is dated April 26, 1968, and was received by the local board on April 29, 1968.

April 14, 1969, wrote to the board recommending that petitioner be granted a "courtesy interview," and "[i]f the local board decides the information presented does not warrant a re-opening of the classification, the [petitioner] should be so notified by letter under the provisions of Section 1625.4 of Selective Service Regulations" (SSF 223).

On May 13, 1969, the courtesy interview was held (SSF 11, 227–228). Petitioner stated at the interview that he did not make up his mind not to serve in the military until after his induction notice, that it is just as well to lose the war, that his brother would refuse to return to Viet Nam, and that the average American is wrong in fighting this war. (*Id.*)

On May 15, 1969 the Board wrote petitioner:

> Please be informed the information presented to the local board on 13 May 1969 at your courtesy interview does not present facts which would warrant reopening of your present Selective Service Classification.
>
> You will remain in the 1-A classification and your Order to Report for induction is still outstanding.
>
> You will be notified of a new reporting date in the near future. [SSF 229.]

On May 29, 1969, the Board wrote to petitioner that he was to report for induction on June 17, 1969. Petitioner had his induction transferred once again and an Order for Transferred Man to Report for Induction, SSS Form 253, was issued ordering him to report for induction on July 7, 1969 (SSF 238, 239).

Petitioner reported on July 7, 1969, and on July 8, 1969, refused induction into the Armed Forces

(SSF 11, 69-71, 97–99, 102, 236). For this refusal petitioner was indicted and convicted.

1. At his trial petitioner contended that he did not "knowingly" refuse to submit to induction because he was confused about the validity of the induction order, since the United States Attorney had previously refused to prosecute for violation of the induction order which was the basis of the "continuing duty" to report upon which his subsequent prosecution was based. The trial court fully instructed the jury on the element of knowledge required (Tr. 128) and the evidence supports the jury's finding that petitioner acted with the requisite intent. See *Harris* v. *United States*, 412 F. 2d 384 (C.A. 9). The court properly instructed the jury that good motive is no defense. *United States* v. *More*, 436 F. 2d 938 (C.A. 9); *United States* v. *Goodman*, 439 F. 2d 810 (C.A. 9), certiorari denied, October 12, 1971, No. 70–312; *United States* v. *Day*, 442 F. 2d 1034 (C.A. 9). That defendant may have acted upon advice of counsel is no defense. *United States* v. *Wood*, 446 F. 2d 505 (C.A. 9). Nor would private doubts about an order's validity be a defense. *United States* v. *Boardman* 419 F. 2d 110 (C.A. 1), certiorari denied, 397 U.S. 991.

The order to report for induction was, in fact, valid. Actions taken by the local board subsequent to the refusal of the United States Attorney to prosecute for the first refusal to be inducted, including the granting of a "courtesy interview," cured any possible defect in the order. See *United States* v. *Wood*, 446 F. 2d 505 (C.A. 9). While petitioner claims (without refer-

ence to the record) that he knew of the prior refusal to prosecute and the reasons therefor, the record does not support his claim that he was confused as to the validity of the outstanding order to report for induction.*

2. Petitioner also contends that the trial court exceeded its discretion in commenting on the evidence to the effect that if the jury believed the testimony of the defendant; the defendant had made a judicial confession to the elements of the offense charged in the indictment. He argues that these comments are in the nature of a directed verdict even though the court instructed the jury that it was the finder of the facts and did not have to accept the comments of the court. Petitioner's contention is contrary to judicial precedents. *E.g., Quercia v. United States*, 289 U.S. 466; *United States v. Jackson*, 436 F. 2d 39 (C.A. 9); *Estrada v. United States*, 392 F. 2d 529 (C.A. 9); certiorari denied, 393 U.S. 881; *Charles A. Wright, Inc. v. F. D. Rich Co.*, 354 F. 2d 740 (C.A. 1), certiorari denied, 384 U.S. 960. The trial court made the comments

* Petitioner's trial testimony suggests that he developed his theory during pretrial preparation: "My lawyer and I figured that there was an error in the file * * * because they ordered up this courtesy interview" (Tr. 109-101). On July 9, 1969, the day after petitioner had refused to submit to induction, he wrote to the local board inquiring about obtaining a copy of "everything" in his Selective Service File. He learned about the contents of the United States Attorney's letter of February 27, 1969, after he obtained the copy of the file (Tr. 101). Thus, at the time petitioner refused to submit to induction he had no knowledge of the contents of the United States Attorney's letter of February 27, 1969, and it could not have been a basis for his thinking that the induction order was defective.

because defense counsel had argued repeatedly to the jury an erroneous theory of law, that defendant lacked the requisite criminal intent because belief in the illegality of the induction order was a valid defense, and that defendant "may make a sophisticated judgment that he is not violating the law." Given such arguments, the court properly stated to the jury:

> In this connection, on commenting on the evidence in this case, as permitted by the law of the United States, and you do not have to accept the comments in your finding of facts, if you believe the evidence of the defendant, his testimony, then I can tell you if you believe and you find that you believe the testimony of the defendant, then the defendant has made a judicial confession to the element of the offense charged in the indictment. [Tr. 131.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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